

THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW

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Abstract

This contribution commences with a brief overview of the origin of economic, social and cultural rights and their eventual codification in the 1966 International Covenant on Economic, Social and Cultural Rights. The main part then focuses, firstly, on the nature and scope of state obligations for the realization of Covenant rights and the enforcement mechanisms created under the Covenant and its Optional Protocol, and secondly, on the role of the UN Human Rights Council and the UN Security Council. In the conclusion, three contemporary developments are highlighted which could open up new areas in which economic, social and cultural rights could find further application.

Keywords: Agenda 2030, Committee on ESCR, Obligations of Conduct, Obligations of Result, UN Human Rights Council.

I. INTRODUCTION

The concept of economic, social and cultural rights is, as an international human rights concern, most significantly linked to the 1966 International Covenant for the Protection of Economic, Social and Cultural Rights (ICESCR). By 2019, this Covenant had 170 states parties, an achievement that is just short of the 173 states parties to the 1966 International Covenant on Civil and Political Rights (ICCPR). These seminal Covenants, which together with the 1948 Universal Declaration of Human Rights, are commonly referred to as the International Bill

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of Rights, represent the different ideological approaches to the two categories of rights and in state obligations of implementation between economic, social and cultural rights on the one hand and civil and political rights on the other, a divide that was not part of the conceptualization of the Universal Declaration of Human Rights.

However, legal developments at both the international and domestic levels in subsequent years have eroded the original arguments used to justify differences in state obligations, justiciability and implementation with respect to the two categories of rights. In addition, socio-economic rights are no longer an unfamiliar topic in legal systems and evolving jurisprudence at the international, regional and domestic level has main-streamed this category of rights which are now also an integral part of the international community's development agenda. In this context, and given the constraints of space and remit, this contribution will commence with a brief revisit of the origins of these rights and their eventual codification in the ICESCR. The main part of the contribution will then, firstly, focus on the nature and scope of the state obligations states parties assume under the Covenant and the role of the different enforcement mechanisms created by the Covenant and its Optional Protocol, and secondly, on the roles of the Human Rights Council and the Security Council in the protection of economic, social and cultural rights. The conclusion covers some recent developments which may have further implications for the role of economic, social and cultural rights.

II. BRIEF HISTORICAL OVERVIEW

Since the international codification of economic, social and rights is primarily a post-World War II development, this part will highlight a few key historical developments¹ since the adoption of the UN Charter in 1945. While the Charter refers to human rights and fundamental freedoms in several places,² economic and social rights are not specifically mentioned. Instead they seem to be implied

¹ For a comprehensive account see Ben Saul (ed), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948 – 1966 Vol I* (Oxford: Oxford University Press, 2016).

² UN Charter, preamble, Arts 1(2) and (3); 55.

where the Charter speaks about the need to promote “higher standards of living, full employment, and conditions of economic and social progress and development and to find solutions in respect of international economic, social, health and related problems”.³ Seemingly, the same is also implied where the Charter spells out the powers and functions of the Economic and Social Council (ECOSOC) by stating that the Council will be entitled to “make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters”.⁴ In terms of the Charter, UN member states also pledge to take joint and separate action for the achievement of the above objectives.⁵

These ideals had links with the principles set out in the Atlantic Charter of 1941, a statement by the UK and US governments for the new post-war organization and which were subsequently endorsed by 26 allied countries in the Declaration of the United Nations of 1 January 1942. Of the four freedoms listed by President Franklin D Roosevelt in his famous State of the Union address on 9 January 1941, ‘freedom from want’⁶ foreshadowed the need for the development of economic conditions in the post-WWII international community of states that could respond to the social and economic needs of citizens everywhere in the world.⁷

Perhaps one of the most important early developments in the codification of socio-economic rights after the establishment of the United Nations is the adoption in 1948 of the Universal Declaration of Human Rights, which was ECOSOC’s first project, following its establishment in 1946, to bring into effect an international bill of rights.⁸ As Saul⁹ has pointed out, already during the drafting process for a Universal Declaration, disagreements were emerging between states on having a catalogue of social and economic rights. However, the controversy was not over having such rights enumerated in an international instrument, but over their implementation, enforcement, supervision and justiciability.

³ UN Charter, art 55(a) and (b).

⁴ UN Charter, art 62(1).

⁵ UN Charter, art 56.

⁶ The others were freedom of speech, freedom of religion and freedom from fear.

⁷ Saul, *The International*, 96.

⁸ ECOSOC res 1/5, 16 February 1946.

⁹ Saul, *The International*, 99.

Arguably, what tempered the divisions at the time was the 1944 American Law Institute's Statement of Essential Human Rights which distilled a universal list of basic individual rights found in different countries and traditions. The commentary to the Statement pointed out that social and economic rights were already enshrined in the constitutions and other laws of a range of countries. This included the right to property (50 constitutions); education (40 constitutions); work (9 constitutions); conditions of work (18 constitutions); and housing (11 constitutions).¹⁰ To this one should add changing social conditions as a result of the effects of WWII, greater industrialization and political sentiments in favour of social democracies, either as part of a national tradition (Latin America) or as a remedy for totalitarianism (Europe).¹¹

Given the ideological divisions between East and West after WWII, it is truly remarkable that when the 58 UN members at the time voted in the General Assembly¹² for the adoption of the Universal Declaration there were only eight abstentions and no dissenting voice. To accommodate the diverse views of the Soviet Union and other socialist states, who favoured an interventionist role of the state for the realization of the social and economic rights in the Declaration, and their western counterparts, who opted for market forces, individual endeavours and voluntary methods, a compromise provision was needed on the issue of implementation. This took the form of article 22, which reads as follows:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Perhaps what also facilitated consensus amongst the UN member states at the time was the fact that the Declaration was not intended as a binding document but was merely proclaimed by the General Assembly in the preamble as a “common standard of achievement for all peoples and all nations...”. This

¹⁰ *Ibid.*, 101.

¹¹ *Ibid.*, 102.

¹² General Assembly resolution 217A(III) of 10 December 1948.

agreement on the 'common standard of achievement' also covers the following social, economic and cultural rights: the abolition of slavery and the slave trade in all their forms (article 4); the right to own property and not to be arbitrarily deprived of it (article 17); the right to social security (article 22); the right to work and to favourable conditions of work (article 23); the right to a standard of living adequate for an individual's health and well-being (article 25); right to education (article 26); and freedom of participation in cultural life (article 27).

A peculiar aspect of article 22 is the mentioning of the right to social security since this provision is aimed at ensuring the implementation of the Declaration and not at the enumeration of specific economic and social rights. This is even more peculiar since the right to social security is regulated in article 25. According to commentators the explanation for the incorporation of the right to social security in article 22 had to do with the fact that it was meant to carry a broad and general meaning in that provision to denote the concept of social justice as the all-embracing idea behind the realization of all economic, social and cultural rights and to prevent a restricted, technical interpretation.¹³

The importance of the Universal Declaration as a point of reference for future developments in the codification of human rights standards and for transforming our understanding of human rights must not be underestimated. By providing for social, economic and cultural rights alongside civil and political rights at a time when the former category was often conceived as not worthy of recognition on a par with the latter category, it has laid the foundation for later formulations in numerous General Assembly and Security Council resolutions and other international law instruments re-affirming the indivisibility, interdependence and interrelatedness of all human rights. The Declaration also underlines the similarities between the two categories of rights by using the same language in describing the subject of the right ('everyone is...') and by implying that the implementation of these rights is not dissimilar to the implementation of civil

¹³ Rodrigo Uprimny, "Article 22 and The Role of Economic, Social and Cultural Rights in the Realization of Social Justice," in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, ed. Carla Ferstman and Tony Gray (London: Routledge, 2018), 173-175.

and political rights as far as their urgency is concerned. For instance there is no provision subjecting any of the social and economic rights to 'progressive realisation' by the state.¹⁴

III. TREATY-BASED AND OTHER SELECT MECHANISMS FOR THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

3.1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The 1966 ICESCR is the most comprehensive international instrument for the protection of economic, social and cultural rights. By virtue of articles 21 and 22, ECOSOC was mandated to report from time to time to the UN General Assembly on the measures taken and the progress made in achieving general observance of the rights in the Covenant and to bring to the attention of other organs of the UN any matters which may assist such organs in deciding on the measures to be taken that could contribute to the effective progressive implementation of the Covenant. In 1985, these functions were transferred to a newly established body, the Committee on Economic, Social and Cultural Rights.¹⁵ Yet another change in the enforcement capacity of the Covenant was effected in 2008 when the UN General Assembly adopted the Optional Protocol to the Covenant¹⁶ empowering the Committee to receive and consider communications by or on behalf of individuals or groups of individuals claiming to be victims of a violation of the rights in the Covenant, matters that will be dealt with below.¹⁷ By 2019, the Optional Protocol, which entered into force on 5 May 2013, had 24 ratifications.

This section will focus on three substantive issues in the Covenant, namely the Covenant's peculiar formulation in respect of the recognition of the rights,¹⁸

¹⁴ Danwood M Chirwa, "The Universal Declaration of Human Rights, Economic, Social and Cultural Rights and Human Rights Discourse," in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, ed. Carla Ferstman and Tony Gray (London: Routledge, 2018), 183-184.

¹⁵ ECOSOC resolution 1985/17 (28 May 1985).

¹⁶ General Assembly resolution 63/117 (10 December 2008).

¹⁷ *Ibid.*, Art 2.

¹⁸ The Covenant contains the following rights pertaining to: work (art 6); conditions of work (art 7); trade unions (Art 8); social security (Art 9); family (Art 10); standard of living (Art 11); physical and mental health (Art 12);

the state obligations in respect of the realization of the rights, and the supervisory role of the Committee on Economic, Social and Cultural Rights.

3.1.1. The Formulation of the Rights

In contrast to the Universal Declaration on Human Rights and the ICCPR, the Covenant on ESCR does not formulate the rights provisions with the emphasis on the person as the bearer of the right (ex. Everyone has...) but commences each provision with: “The States Parties recognize the right of everyone...” or “undertake to”, for example. This is so, since unlike in the case of civil and political rights, which are predicated on the universal assumption that these rights restrain state intervention, the rights in the Covenant on ESCR emphasize their programmatic nature and their dependence on positive state action and resources.¹⁹ Furthermore, the realization of these rights is inextricably linked to the right to self-determination in article 1 of the ESCR Covenant which has an identical formulation with article 1 of the ICCPR. The Human Rights Committee, which is the supervisory body of the ICCPR, has commented that the right to self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of the individual rights in the ICCPR.²⁰ By the same token, it should fulfil the same function in the ICESCR. By virtue of the right to self-determination all peoples freely determine their political status and pursue their economic, social and cultural development and freely, and for their own ends, dispose of their natural wealth and resources. As a result, states parties to the Covenant are obligated to promote the realization of the right to self-determination and shall respect that right in conformity of the UN Charter.²¹

3.1.2. State Party Obligations

The above obligation in respect to self-determination is supplemented by the obligations in article 2 which apply to the full range of rights enumerated

education (Arts 13, 14); and cultural life (Art 15).

¹⁹ Chirwa, “The Universal Declaration,” 184.

²⁰ HRC *General Comment* No 12 (13 March 1984).

²¹ ICESCR, art 1() – (3). See also art 25.

in the Covenant. Article 2 comprises three provisions, articulating the nature and extent of state party obligations for the realization of the Covenants substantive provisions. Firstly, it imposes on states parties the obligation to take steps,²² to the maximum of their available resources “with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures”.²³ The steps to be taken include procuring international assistance and cooperation, especially through economic and technical means, for achieving the objectives of the Covenant. Secondly, states parties undertake to guarantee the exercise of the rights in the Covenant without discrimination of any kind as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.²⁴ In the third instance, article 2 singles out developing countries by leaving it to their discretion the extent to which they would guarantee the Covenant’s economic rights to non-nationals with due regard to human rights and their national economy.²⁵

What needs to be emphasized here is that when states commit to treaty obligations by ratifying or acceding to a treaty they also commit to the *pacta sunt servanda* rule under article 26 of the 1969 Vienna Convention on the Law of Treaties, which means that the treaty must be performed in good faith. The observance of a treaty under the good faith obligation has the further consequence that a state is prevented from invoking the provisions of its domestic law as justification for its failure to perform a treaty.²⁶ Consequently, a state mindful of the implications of these rules can be expected to act responsibly when considering its ability to perform in terms of a treaty that will eventually bear the state’s consent and to avoid

²² Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford: Oxford University Press, 2014), 137; Manisuli Ssenyonjo, “Economic, Social and Cultural Rights: An Examination of State Obligations,” in *Research Handbook on International Human Rights Law*, ed. S Joseph and A McBeth (Cheltenham: Edward Elgar Publishing Ltd, 2010), 36.

²³ *Ibid.*, Art 2 (1).

²⁴ *Ibid.*, Art 2(2).

²⁵ *Ibid.*, Art 2(3).

²⁶ Vienna Convention on the Law of Treaties (1969), Art 27.

a situation where the consent to be bound is given for politically expedient or symbolic reasons. By acting with indifference to the realisability of a treaty's objectives, states will undermine the rule of law and the trust that is needed to make inter-state relations work.²⁷ The good faith obligation applies with equal force to the interpretation of treaties. The general rule of treaty interpretation in article 31 of the Vienna Convention on the Law of Treaties clearly states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In general, the good faith rule in this provision aims at the "fulfillment of a treaty in a way that the other party (or parties) to the treaty may reasonably expect on the basis of the text agreed upon, or, in other word, in such a way as is required by the sense and purpose of the treaty, as understood by the contracting parties in good faith".²⁸

Of particular importance in understanding the nature and scope of state obligations in terms of the above provisions in the Covenant on Economic, Social and Cultural Rights, is General Comment No 3, issued by the Committee²⁹ on Economic Social and Cultural Rights in 1990.³⁰ In this Comment, the Committee distinguishes between obligations of conduct and obligations of result or between obligations which are of immediate effect and obligations which are subject to progressive realization due to limitations imposed by available resources. Under the first category is classified the obligation 'to take steps' for the realization of the substantive rights and to 'guarantee' that the rights will be exercised without discrimination.³¹ As to the taking of steps the Committee is further of the view that while the full realization of the rights may be achieved progressively, steps towards that goal must be taken within a relatively short time after entry into force of the Covenant for the state in question. Furthermore, the steps in question

²⁷ "*Cabčikovo-Nagymaros Project (Hungary v Slovakia)*" (ICJ Reports, 1997), para 142.

²⁸ R Kolb, "Article 2(2)," in *The Charter of the United Nations: A Commentary* vol I, ed. B Simma et al (2012), 178.

²⁹ The Committee is established in terms of ECOSOC resolution 1985/17.

³⁰ CESCR, General Comment No 3: *The nature of States parties' obligations*, Document E/1991/23.

³¹ *Ibid.*, para 1, 2.

should be “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.³²

While it is within the discretion of each state party to decide for itself which realization measures are the most appropriate under the circumstances in respect of each of the rights, the Committee urged states to indicate in their reports under article 16 of the Covenant not only the measures they have taken but also the reasons why the measures are considered the most appropriate under the circumstances. However, it is ultimately for the Committee to decide whether all appropriate measures have been taken by the state party.³³

In respect of the ‘progressive realization’ obligation, the Committee has admonished that this should not be interpreted in a way that will deprive the obligation of all meaningful content. While it is a flexible device, taking into account political, social and economic realities, it must still be understood in the context of the overall objective, namely the full realization of the rights in the Covenant. Consequently, it imposes an “obligation to move as expeditiously and effectively as possible towards that goal”.³⁴

An especially noteworthy aspect of the Comment, is the Committee’s explication of the ‘minimum core obligation’ states parties have to ensure the satisfaction, at the very least, of minimum essential levels in respect of each right. This means that a “State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Charter”.³⁵ Consequently, in cases where a state party attributes its failure to meet its minimum core obligation to a lack of available resources, it “must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”.³⁶

³² *Ibid.*, para 2.

³³ *Ibid.*, para 4.

³⁴ *Ibid.*, para 9.

³⁵ *Ibid.*, para 10.

³⁶ *Ibid.*

In 2017, the Committee adopted a comprehensive General Comment on state obligations in the context of business activities³⁷ with the purpose of addressing the adverse impacts of business activities on human rights. According to the Comment, business activities “include all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure”.³⁸

In terms of the non-discrimination provision in the Covenant, the Comment is of the view that the duty on the state party to prohibit discrimination, both in the formal and substantive sense, in the exercise of economic, social and cultural rights, includes the duty to prohibit discrimination by non-state entities, especially in the case of those segments of the population that face a greater risk of suffering inter-sectional and multiple discrimination, like women and children, indigenous peoples and people with disabilities.³⁹ Overall, the Committee understands the Covenant to impose obligations on states parties at three levels, i.e. to respect, to promote and to fulfil, which apply to situations at the domestic level as well as extraterritorially in situations over which a state party may exercise control.⁴⁰ In this context the Committee confirms the international law principles by means of which a state party may be held responsible for the actions or omissions of non-state parties, namely if (a) the non-state entity acts on the instruction, or under the control or direction of the state party in respect of a certain activity; (b) if, by law, the non-state entity is empowered to perform certain governmental functions; or (c) the conduct of the non-state party is acknowledged by the state party and adopted as its own.⁴¹

The obligation to respect is violated when a state party prioritizes the interests of non-state entities over Covenant rights “without adequate

³⁷ General Comment No 24 (2017), UN Doc E/C.12/GC/24 (10 August 2017).

³⁸ *Ibid.*, para 3.

³⁹ *Ibid.*, para 7 – 9.

⁴⁰ *Ibid.*, para 10.

⁴¹ *Ibid.*, para 11.

justification, or when they pursue policies that negatively affect such rights”.⁴² This obligation also has implications for bilateral trade or investment treaties in case of a potential conflict between such treaties and the Covenant. In view of the obligation in article 26 of the 1969 Vienna Convention on the Law of Treaties to perform binding treaties in good faith, the Committee holds the view that states should determine in advance whether a conflict exists and refrain from entering into trade and investment treaties when this is indeed the case.⁴³

The obligation to protect means that a state party must act preventively to avoid infringements of the rights in the Covenant in the context of business activities. This will require an effective criminal or administrative sanctions regime for violations and a legal framework requiring business entities to exercise human rights due diligence with a view to identify, prevent and mitigate the risk of violations of Covenant rights.⁴⁴ Also noteworthy is the Committee’s focus on the combating of corruption, which, according to the Committee, undermines a state’s ability to mobilize resources for the realization of the rights in the Covenant and which leads to discriminatory access to public services, favouring those who have close links with the authorities.⁴⁵

The obligation to fulfil is an obligation of result. It requires that states parties take steps to the maximum of their available resources to facilitate and promote the enjoyment of Covenant rights, which, in certain cases, may require the direct provision of goods and services essential for such enjoyment.⁴⁶ Apart from requiring the mobilization of state resources in this instance, the obligation to fulfil may also require directing the efforts of business entities towards this objective.⁴⁷

⁴² *Ibid.*, para 12.

⁴³ *Ibid.*, para 13.

⁴⁴ *Ibid.*, paras 14 – 16.

⁴⁵ *Ibid.*, para 20.

⁴⁶ *Ibid.*, para 23.

⁴⁷ *Ibid.*, paras 23, 24.

A substantial part of the Comment deals with remedies in case of a violation. It requires in the first instance effective monitoring, investigation and accountability mechanisms; secondly, remedies, judicial and other, must be available, effective and expeditious; and thirdly, business entities must be prevented from escaping accountability by hiding behind the so-called corporate veil or by obstructing the making available of information.⁴⁸

3.1.3. The Supervisory Role of the Committee

Under the Covenant states parties have an obligation to submit reports to the Committee indicating which measures they have taken in achieving the objectives of the Covenant.⁴⁹ Such reports may also indicate factors and difficulties affecting the degree of compliance with state party obligations in the Covenant.⁵⁰

The reporting duties of states were dealt with in the Committee's first General Comment,⁵¹ spelling out the objectives of reporting. The first objective, which is of special significance in the case of a state party's first report, is that it must entail a comprehensive review with regard to national legislation, administrative rules and procedures aimed at ensuring the fullest possible conformity with the Covenant.⁵² The second objective is to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis so that a proper diagnosis and knowledge of the situation are demonstrated.⁵³ The third objective is to enable the government to demonstrate that a principled policy-making has in fact been undertaken to provide a basis for the establishment of priorities that are commensurate with the provisions of the Covenant.⁵⁴ The fourth objective is to facilitate public scrutiny of government policies and to involve various sectors of society in the formulation, review and implementation of the

⁴⁸ *Ibid.*, paras 38 *et seq.*

⁴⁹ Covenant art 16.

⁵⁰ *Ibid.*, Art 17(2).

⁵¹ General Comment No 1 (1989).

⁵² *Ibid.*, para 2.

⁵³ *Ibid.*, para 3.

⁵⁴ *Ibid.*, para 4.

policies.⁵⁵ The fifth objective is to provide a basis for the state party and the Committee to effectively evaluate the extent to which progress has been made towards realization of the Covenant's obligations.⁵⁶ The sixth objective is to enable the state party to develop a better understanding of problems and shortcomings encountered in the progressive realization of the Covenant rights.⁵⁷ The seventh objective is to enable the Committee and the states parties as a whole to facilitate the exchange of information and to develop a better understanding of the common problems faced by states.⁵⁸

In assisting states with their reporting duties, the UN Secretary-General, on request by the General Assembly, published a compilation of reporting guidelines for states in 2009.⁵⁹ The guidelines are intended to bring about some uniformity in the method of reporting and the substantial issues states parties are required to provide information on. Since the guidelines are of a technical nature they fall outside the scope of this contribution.

Apart from issuing general comments of the kind above, the Committee also issues Concluding Observations in response to reports submitted by states parties.⁶⁰ The purpose of these reports is to point out positive and negative aspects in individual countries regarding the implementation of the Covenant and to make recommendations to improve the situation. An example is the Committee's 2014 Concluding Observations in respect of Indonesia's first report where the Committee raised concerns about the lack of information on jurisprudence invoking the Covenant before lower courts and the insufficient number of legal professionals hindering victims' access to redress.⁶¹ Various other issues of concern also featured in the report, among them discriminatory practices and high levels of corruption.

⁵⁵ *Ibid.*, para 5.

⁵⁶ *Ibid.*, para 6.

⁵⁷ *Ibid.*, para 8.

⁵⁸ *Ibid.*, para 9.

⁵⁹ UN Doc HRI/GEN/2/Rev.6 (3 June 2009).

⁶⁰ "UN Treaty Body Database," United Nations Human Rights, Office of the High Commissioner, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5, accessed on 18 August 2019.

⁶¹ UN Doc E/C.12/IDN/CO 1 (19 June 2014).

A further avenue for bringing violations to the attention of the Committee was introduced in 2008 with the adoption of the Optional Protocol to the Covenant referred to earlier. This instrument authorized the Committee to receive and consider petitions from individuals or groups against the national state provided that the state is a party to the Optional Protocol, all available domestic remedies have been exhausted and the complaint has been declared admissible by the Committee.⁶² An interesting feature of this mechanism is that the Committee is entitled, after receipt of the complaint and before a determination on the merits, to request the state to take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable harm to the victim/s of the alleged violation.⁶³ The Committee may also provide its good offices to achieve a friendly settlement between the parties commensurate with the Covenant's requirements. A settlement of this kind forecloses a determination by the Committee on the merits of the complaint.⁶⁴

The Optional Protocol also introduces the inter-state complaint mechanism⁶⁵ which is a well-known, but ineffective, treaty-based human rights protection measure. The availability of this mechanism, which allows a state party to submit a complaint against another state party alleging non-compliance with the Covenant, is conditioned upon a declaration by both states parties indicating their acceptance of the inter-state complaint mechanism. Thus, ratification of the Optional Protocol alone is not enough to bring this mechanism into effect. Moreover, states parties are reluctant to make use of this mechanism since the complaining state may expose itself to a complaint by the state party against whom the mechanism was invoked.

Another discretionary procedure subject to a declaration by a state party is an inquiry by the Committee.⁶⁶ This is a confidential procedure in

⁶² Optional Protocol arts 1 -3.

⁶³ *Ibid.*, Art 5.

⁶⁴ *Ibid.*, Art 7.

⁶⁵ *Ibid.*, Art 10.

⁶⁶ *Ibid.*, Art 11.

the case of reliable evidence received by the Committee indicating grave or systematic violations by a state party of the rights in the Covenant. The Committee is then entitled to invite the state party to cooperate in the examination of the evidence. Following the findings by the Committee after completion of the inquiry, the Committee may invite the state party concerned to indicate in its reports to Committee the measures that were taken in response to the Committee's findings.⁶⁷

IV. THE UN HUMAN RIGHTS COUNCIL

The Council was established in 2006⁶⁸ to replace the former UN Human Rights Commission which has become politically tainted by its politically correct membership which included some of the worst human rights abuser countries in the world. It is debatable whether the Council, which replaced it, constitutes a substantial improvement in this area when we take into account that countries like Saudi Arabia, Afghanistan, Egypt, Cameroon and the DRC currently occupy seats on the Council.⁶⁹ These fault lines will remain since they are inherently part of the obligatory regional spread of countries to be represented on the Council: African states 13; Asia-Pacific 13; Latin America 8; Western Europe and others 7; and Eastern Europe 6.⁷⁰ The picture is rounded off by futile requirements for membership, namely that when members are elected the UN General Assembly must take into account the contributions of candidates to the promotion and protection of human rights⁷¹ and once elected, members shall uphold the highest standard in the protection and promotion of human rights (*sic*).⁷²

In any event, the Council is attempting to comply with its mandate by means of a universal periodic review⁷³ of the human rights situation in all UN

⁶⁷ *Ibid.*, Art 12.

⁶⁸ "Resolution Adopted by the General Assembly," General Assembly, United Nations, March 15, 2006, https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf.

⁶⁹ "Membership of the Human Rights Council," United Nations Human Rights Council, accessed on 18 August 2019, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx>.

⁷⁰ "Resolution Adopted by the General Assembly," 60/251 *supra* para 7.

⁷¹ *Ibid.*, para 8.

⁷² *Ibid.*, para 9.

⁷³ *Ibid.*, para 5(e).

member states, the special procedures inherited from the defunct UN Human Rights Commission⁷⁴ and a complaints procedure.⁷⁵ The latter is a victim-oriented and confidential procedure to investigate consistent patterns of gross and reliability attested human rights violations of all kinds.⁷⁶

As part of the universal periodic review process, the Council's assessment will, as a matter of course, also cover the situation with regard to economic, social and cultural rights in the country under review. However, this topic has been the subject of Council resolutions as well. A recent example is the resolution adopted in March 2019⁷⁷ calling on states to give full effect to economic, social and cultural rights and to take all appropriate measures to implement the Council's resolutions in this regard.⁷⁸ It also underlines the importance of access to justice and an effective remedy for violations of these rights as well as the need to consider legal remedies as the best way to give domestic legal effect to the rights in the Covenant.⁷⁹

In 2019, the Council has also again taken up, by way of a resolution, the issue of unilateral coercive measures (sanctions) and their impact on the enjoyment of all human rights.⁸⁰ According to the preamble "no state may use or encourage the use of any type of measure, including, but not limited to economic, or political measures, to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from its advantages of any kind". Apparently, this statement is conditioned upon the Council's view in the preamble that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among states". In the resolution's operative part the Council therefore "[s]trongly condemns the continued unilateral application and enforcement by certain powers of such

⁷⁴ *Ibid.*, para 5(g).

⁷⁵ Established in terms of Human Rights Council resolution 5/1 (2007) section IV.

⁷⁶ For a more comprehensive account of these mechanisms see L Richardson, "Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council," *Human Rights Law Review* 15 (2015): 409.

⁷⁷ UN Doc A/HRC/REC/40/12 (8 April 2019).

⁷⁸ *Ibid.*, para 3.

⁷⁹ *Ibid.*, paras 8, 9.

⁸⁰ UN Doc A/HRC/RES/40/3 (5 April 2019).

measures as tools of pressure against any country...”⁸¹ and “[r]ejects all attempts to introduce unilateral coercive measures, and the increasing trend in this direction...”⁸² Apparently, what the Council is addressing here are the type of traditional, indiscriminate sanctions imposed against states and which predate contemporary targeted sanctions aimed at individuals or legal entities within a state. In the latter case there is no clear and binding international law norm prohibiting the unilateral imposition of such sanctions.

In any event, what the Council is concerned about are the human rights consequences of unilaterally imposed coercive and indiscriminate measures against states. In this regard it is of the view that such measures create obstacles to the full implementation of rights set forth in all international human rights instruments;⁸³ entails adverse implications for the enjoyment of human rights by innocent people;⁸⁴ and deprive people of their own means of subsistence and development.⁸⁵

Of special significance is the Commission of Inquiry established by the Council in 2013 to investigate the systematic, widespread and grave violations of human rights in the Democratic Peoples’ Republic of Korea (DPRK).⁸⁶ In its report, published in 2014,⁸⁷ the Commission pointed out that the right to food, freedom from hunger and to life, in the case of the DPRK, are not matters to be assessed in the context of food shortages and access to a commodity. What the state has done was to use food as a means of control over the population and confiscation and dispossession of food and deliberate starvation have followed the same logic.⁸⁸ The Commission also found evidence of systematic, widespread and grave violations of the right to food and that “decisions, actions and omissions by the State and its leadership caused the death of at least hundreds of thousands of people and inflicted permanent physical and psychological injuries on those who

⁸¹ *Ibid.*, para 5.

⁸² *Ibid.*, para 14.

⁸³ *Ibid.*, para 2.

⁸⁴ *Ibid.*, para 6.

⁸⁵ *Ibid.*, para 12.

⁸⁶ HRC resolution 22/13 (21 March 2013).

⁸⁷ UN Doc A/HRC/25/62 (7 February 2014).

⁸⁸ *Ibid.*, paras 46, 47, 52.

survived”.⁸⁹ Based on the nature and scope of these violations, the Commission reached the conclusion that they constituted crimes against humanity which merit a criminal investigation by a competent national or international organ of justice.⁹⁰

V. THE UN SECURITY COUNCIL

Initially, counter-terrorism measures imposed by the Security Council prior to and in response to the 9/11 terrorist attack in the United States were oblivious to the human rights guarantees individuals affected by the measures were entitled to. This is illustrated by two seminal resolutions. In 1999, in a binding chapter VII resolution, the Security Council acted against the Taliban in Afghanistan and demanded the surrender of Osama bin Laden to a country where he had been indicted.⁹¹ In the case of non-compliance with this request, all states were, *inter alia*, obliged to impose a flight ban on and freeze the funds and financial resources owned or controlled by the Taliban.⁹² The resolution further expected states to “act strictly in accordance” with the resolution “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement...” prior to the date of coming into force of the measures imposed by the resolution.⁹³ In terms of its open-endedness, this provision, seemingly, also ruled out the applicability of treaty-based human rights obligations member states were bound to respect. The second resolution is the famous resolution 1373, adopted by the Council in response to the 9/11 terrorist bombings in the USA. Acting again under chapter VII of the UN Charter, the Council imposed broad-based obligations on states aimed at preventing and suppressing the financing of terrorist attacks as well as the criminalization of such activities.⁹⁴ The only human rights obligations invoked by this resolution were those applicable to the granting of refugee status when states had to take measures aimed at ensuring

⁸⁹ *Ibid.*, para 53.

⁹⁰ *Ibid.*, paras 74, 78.

⁹¹ SC resolution 1267 (1999) para 2.

⁹² *Ibid.*, para 4.

⁹³ *Ibid.*, para 7.

⁹⁴ SC resolution 1373 (2001) paras 1, 2.

that an asylum-seeker has not facilitated or participated in the commission of terrorist acts.⁹⁵

Shortly before the adoption of resolution 1373, UN member states gave their blessing in the 2000 United Nations Millennium Declaration for respect for human rights and fundamental freedoms and for the rule of law as key objectives for international relations in the 21st century. In addition, under the peace, security and disarmament section of the Declaration, Heads of State and Government committed themselves, in two separate but successive statements, to ensure the implementation of human rights treaties and to “take concerted action against international terrorism”.⁹⁶ Barely three years later the Security Council, meeting at the level of Ministers of Foreign Affairs, called on states to ensure that the measures they take in combating terrorism comply with “all their obligations under international law ... in particular international human rights, refugee and humanitarian law”.⁹⁷ In 2004, the Council reiterated this call, but only in the preamble of a resolution that was adopted under Chapter VII of the UN Charter.⁹⁸ Then in 2005, the Council again included the call in the operative part of resolution,⁹⁹ which, like the one in 2003, obviously lacked binding force. Moreover, the measures in question were of the less-invasive type, covering the prevention and prohibition of incitement to commit terrorist acts, the strengthening of border controls, and the prevention of the indiscriminate targeting of different religions and cultures.¹⁰⁰

Two further developments strengthened the concern with human rights. The one was the *In Larger Freedom* report by the UN Secretary-General who warned against compromising human rights guarantees in the fight against terrorism and urged member states to create a special rapporteur that could monitor and report on the compatibility of counter-terrorism measures with human rights

⁹⁵ *Ibid.*, para 3(f).

⁹⁶ GA resolution 55/2 (18 September 2000) para 9.

⁹⁷ Security Council resolution 1456 (2003) para 6.

⁹⁸ Security Council resolution 1566 (2004).

⁹⁹ Security Council resolution 1624 (2005) para 4.

¹⁰⁰ *Ibid.*, para 4 read with paras 1 – 3.

laws.¹⁰¹ The other was the World Summit Outcome Document¹⁰² which confirmed again that international cooperation in the fight against terrorism must comply with member states' human rights obligations.¹⁰³ Based on these developments, the UN Secretary-General in 2006 submitted his Recommendations for a Global Counter-Terrorism Strategy¹⁰⁴ which lists as one of the priority areas for developing states' preventive capacity the need for promoting the rule of law and respect for human rights.¹⁰⁵ A few months later, the General Assembly published the United Nations Global Counter-Terrorism Strategy¹⁰⁶ which provides for a list of measures aimed at ensuring that respect for human rights and the rule of law remains essential to all components of the counter-terrorism strategy. Among these measures is the resolve to support the monitoring roles and recommendations of the Human Rights Council, the UN High Commissioner for Human Rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering¹⁰⁷ terrorism.

Over time the institutional mechanisms created by the Security Council in the combating of terrorism, such as the various Counter-Terrorism Committees¹⁰⁸ and the Office of the Ombudsperson¹⁰⁹ started to play an active role in ensuring that counter-terrorism measures, such as the listing of persons and legal entities, asset freezes and travel bans, were implemented with due regard for human rights guarantees.¹¹⁰ Although the emphasis is often on procedural guarantees pertaining to the listing or de-listing of individuals and legal entities, various resolutions speak in general terms about human rights obligations that must be complied with when states adopt and implement counter-terrorism measures. The

¹⁰¹ UN Doc A/59/2005 (21 March 2005) para 94.

¹⁰² General Assembly resolution 60/1 (24 October 2005).

¹⁰³ *Ibid.*, paras 82, 85.

¹⁰⁴ UN Doc A/60/825 (27 April 2006).

¹⁰⁵ *Ibid.*, para 77.

¹⁰⁶ General Assembly resolution 60/288 (20 September 2006).

¹⁰⁷ *Ibid.*, section IV, paras 6 -8.

¹⁰⁸ Security Council resolutions 1267 (1999); 1373 (2001); 1988 (2011); 2253 (2015).

¹⁰⁹ Security Council resolution 1904 (2009) paras 20, 21.

¹¹⁰ For a comprehensive account of these developments see Hennie Strydom, "Counter-Terrorism Sanctions and Human Rights" in *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard*, ed. T Maluwa, M du Plessis & D Tladi (2017), 395 at 406 *et seq.*

latest example in this category is Security Council resolution 2462 (2019), which in addition to a preambular paragraph to that effect, contains a provision in its operative part determining that “all States shall” comply, *inter alia*, with their human rights obligations when adopting domestic laws for the implementation of Security Council counter-terrorism measures.¹¹¹ In other instances measures impacting specifically on economic and social rights were mentioned. This is the case with resolution 1452 (2002) which excludes from the operation of certain Security Council measures funds or other financial assets or economic resources that states have been determined to be necessary for basic expenses, foodstuffs, rent or mortgage, and medicines and medical treatment.¹¹²

VI. CONCLUSION

Since the adoption of the International Covenant on Economic, Social and Cultural Rights the realization of the rights enumerated in the Covenant has evolved to a point where the justiciability issue has lost its relevance. There is now general acceptance at both the international and domestic levels that such rights too are capable of legal adjudication. Furthermore, the application and interpretation of state obligations under article 2(1) of the Covenant differentiate between obligations of conduct and obligations of result. While the latter is subject to progressive realization without precisely identifiable outcomes, the former is more tangible and requires immediate attention and realization, namely the obligation to ensure the availability of the rights on a non-discriminatory basis and the obligation to take steps to achieve progressively the realization of the rights.

Moving forward on this basis there seems to be three contemporary developments that may further shape the future realization of economic, social and cultural rights. The first is the adoption of the 2030 Agenda for Sustainable Development by the General Assembly in 2015.¹¹³ This Agenda is described as –

¹¹¹ Security Council resolution 2462 (2019) para 5. See also para 6.

¹¹² Security Council resolution 1452 (2002) para 1.

¹¹³ UN Doc A/RES/70/1 (21 October 2015).

...an Agenda of unprecedented scope and significance. It is accepted by all countries and is applicable to all, taking into account different national realities, capacities and levels of development and respecting national policies and priorities. These are universal goals and targets which involve the entire world, developed and developing alike. They are integrated and indivisible and balance the three dimensions of sustainable development.¹¹⁴

Several of the goals adopted by the Agenda¹¹⁵ have a bearing on economic, social and cultural rights. They include Goal 1 (end poverty in all its forms everywhere); Goal 2 (end hunger and achieve food security); Goal 3 (ensure healthy lives and promote well-being); Goal 6 (ensure availability and sustainable management of water); Goal 7 (ensure access to affordable and reliable and modern energy for all); Goal 8 (promote full and productive employment and decent work for all); Goal 12 (ensure sustainable consumption and production patterns); and Goal 13 (take urgent action to combat climate change and its impacts).

The Agenda and its implementation featured prominently in a 2019 resolution of the UN Human Rights Council on the question of the realization in all countries of economic, social and cultural rights.¹¹⁶ In the preamble the resolution recognizes that the seventeen Sustainable Development Goals and the 169 targets of the Agenda cover a wide range of issues relating to economic, social and cultural rights, in particular with regard to the availability, accessibility, affordability and quality of services and issues relating to domestic resource mobilization, international cooperation and the right to development. In the operative part the resolution underlines the importance of access to justice and an effective remedy for violations of economic, social and cultural rights¹¹⁷ and recognizes that the Agenda's development goals and targets are aimed at, *inter alia*, realizing the human rights of all which are integrated and indivisible.¹¹⁸ This places the realization of economic, social and cultural rights squarely within the project for the realization of the 2030 Agenda for Sustainable Development.

¹¹⁴ *Ibid.*, para 5.

¹¹⁵ *Ibid.*, paras 54 *et seq.*

¹¹⁶ UN Doc A/HRC/RES/40/12 (8 April 2019).

¹¹⁷ *Ibid.*, para 8.

¹¹⁸ *Ibid.*, para 10.

The second development is the 2016 report of the UN Secretary-General, submitted on request of the Human Rights Council, on the question of the realization in all countries of economic, social and cultural rights.¹¹⁹ The subject-matter of this report are the measuring and monitoring of progress or regression in the realization of human rights at the national level, which the report considers as inherent in states' human rights obligations.¹²⁰ Hence, the report states that "measuring and monitoring the state of economic, social and cultural rights in a country is a question of accountability of duty bearers towards rights holders. It is also a crucial element when considering the protection of those rights before the courts".¹²¹ Furthermore, measuring progress in the realization of these rights is "related to obligations to respect, protect and fulfil" the rights in the Covenant.¹²² Given the nature of these obligations, the report warns that the notion of the progressive realization of the Covenant rights is not a mere policy statement but needs to be thoroughly documented by means of the monitoring by states of their targeted steps, the use of maximum available resources, the use of appropriate means, such as laws, policies and program, and clearly established timeframes, indicators and benchmarks.¹²³ Consequently, in light of these human rights obligations, the report recommends that¹²⁴–

all States should implement as soon as possible transparent, participatory and accountable human rights measurement systems, including specific indicators and benchmarks for individuals and communities on their territory or under their jurisdiction. In this context, human rights indicators are essential tools for bridging the gap between development, governance and the human rights frameworks.

How successfully states will be able to comply with recommendations of this kind is a question of the availability and reliability of data, the bureaucratic capacity to correctly and contextually analyze the data and to use it effectively for the promotion of the Covenant rights.

¹¹⁹ UN Doc A/HRC/31/31 (27 January 2016).

¹²⁰ *Ibid.*, para 3.

¹²¹ *Ibid.*, para 5.

¹²² *Ibid.*, para 11.

¹²³ *Ibid.*, para 13.

¹²⁴ *Ibid.*, para 64.

The third, and last, development is the 2019 Draft Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.¹²⁵ As a work in progress, undertaken by a working group of the Human Rights Council, its future adoption and impact are more speculative, but what should not be doubted is that it is a serious project with determined constituencies driving it. At this point it should be noted that the Draft covers all human rights and their bearers who have suffered a violation by a state or a business enterprise, through acts or omissions in the context of business activities. Once adopted and ratified states parties will incur well-crafted and wide-ranging obligations in respect of the investigation of violations, access to justice, legal assistance, legal liability, remedies and the regulation of business activities under their jurisdiction and impact assessments with a view to prevent human rights abuses in the course of business activities.

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¹²⁵ “Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights,” *United Nations Human Rights Council*, accessed on August 21, 2019, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgonc.aspx>.

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